

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

GARRARD COUNTY WATER
ASSOCIATION, INC.

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CASE NO.
89-187

O R D E R

On July 10, 1989, the Commission issued an Order directing Garrard County Water Association, Inc. ("Garrard County") to show cause why it should not be required to refund any unauthorized "impact fees" collected prior to receiving Commission approval, and/or be otherwise penalized under KRS 278.990 for violating provisions of KRS Chapter 278, including KRS 278.160 and KRS 278.280, as implemented by 807 KAR 5:066, Section 12. The Order was issued following a complaint by Imco Development, a partnership, alleging that it was required to pay a fee of \$8,250, in addition to the cost of construction, before Garrard County would approve construction of a water-line extension to its proposed subdivision. The Order also directed Garrard County to show cause why it should not be required to amend certain of its tariffed and internal rules to bring them into compliance with Commission statutes and regulations. At an informal conference held with Commission Staff on August 18, 1989, Garrard County agreed to amend the rules and regulations cited in the Commission's Show Cause Order, thereby disposing of all issues except the legality of the impact fees.

On December 8, 1989, Garrard County filed an amended tariff seeking approval of its impact fees, and on January 3, 1989, Garrard County filed a motion to consolidate the show cause proceeding with the issues raised in its tariff filing. By Order of January 4, 1990, the Commission denied Garrard County's motion to merge the proceedings.

The show cause hearing was held before the Commission on January 9, 1990. Garrard appeared at the hearing and was represented by counsel.

DISCUSSION

Garrard County serves approximately 1,925 customers in 6 distinct areas. When the association was first formed, these areas were all rural in nature; however, subdivisions have recently been developed in one of the areas located north of the city of Lancaster. The increasing residential development in the area has caused concern that Garrard County's distribution facilities may not be adequate to meet the demand for water from all consumers served by the utility. To address this concern, on February 13, 1989, the board of directors of Garrard County adopted a policy to charge all developers approved for water line extensions a fee referred to as an "impact fee." According to Garrard County, the purpose of the fee is to offset the cost of future improvements to Garrard County's facilities which are made necessary by the increased demand on the system by the new development. The fee is calculated by Garrard County's engineers and is payable when the construction agreement to extend

facilities to a development is executed between Garrard County and a developer. The funds so collected are deposited in an insured account maintained at the brokerage firm of Hilliard Lyons Investment Company ("Hilliard Lyons") and are withdrawn only to make capital improvements to the system, such as pumping facilities, storage facilities, and water lines.

Commission regulations allow a utility to require developers to advance the cost of construction of an extension to a subdivision, with refunds made to the developer as customers are hooked on. The impact fees charged by Garrard County are in addition to the cost of the extension itself and are not subject to refund. The fees are novel in that they may be used to make improvements to the system anywhere within the service area of Garrard County, not just within the area of the development. To the Commission's knowledge, no such fees have ever been approved for a utility which it regulates.

After adopting the impact fee, Garrard County entered into written agreements with four development companies. Each of the agreements contained a provision requiring the developer to pay an impact fee.

The first agreement was executed on April 13, 1989 with Imco Development. The agreement provided in part as follows:

"Imco Development shall also pay to the Association an impact fee of \$8,250, these monies to be set aside to make future improvements to the existing distribution system as it is affected by this development."

The amount agreed upon was calculated by Garrard County's engineers and upon payment was deposited in an escrow account at Hilliard Lyons.

The second agreement was executed on April 21, 1989 with Delbert Henry. With the exception of the amount of the impact fee, this agreement contains language identical to that found in the Imco agreement. In accordance with his agreement, Delbert Henry paid an impact fee of \$7,315 which Garrard County deposited in the Hilliard Lyons escrow account.

The third agreement was executed on April 25, 1989 with Donald Hensley. Unlike the previous two agreements, this agreement required Donald Hensley to pay two impact fees, one to offset the impact of his extension on the distribution system and one to offset the impact on the storage system. The total of both fees was \$9,625. However, in lieu of the impact fee, Garrard County allowed Hensley to install a six-inch main rather than the four-inch main that the association had specified. The installation of the larger main, according to Garrard County's witnesses, was entirely voluntary, and the difference in cost between the six-inch main and the four-inch main was within fifty dollars of the assessed impact fee.

The last agreement was executed on May 5, 1989 with James Laughlin. That agreement provided for an impact fee of \$8,278. Of that amount, Laughlin paid \$4,825 and agreed to construct a pressure reducing station for the balance of \$3,453. The funds paid by Laughlin were deposited into the Hilliard Lyons escrow

account, where they remain. The pressure reducing station has been partially constructed but is not complete.

After adopting the requirement of an impact fee, Garrard County on February 17, 1989, mailed to the Commission a copy of its internal regulations concerning extension of its system to new subdivisions and requested that the regulations be reviewed. Harold C. Ward, President of the association, testified at the hearing that on April 28, 1989, he spoke with Commission Staff by telephone and was advised to put the extension regulations in tariff form and submit them for approval. Through inadvertence or misunderstanding, Garrard County failed to file the tariff as instructed. It is undisputed that at the time the agreements with the four developers were executed, the impact fees had not been approved by the Commission, nor were they a part of any tariff on file with the Commission.

KRS 278.010(10) defines a "rate" as "any . . . charge . . . or other compensation for service rendered or to be rendered by any utility . . . and any requirement relating to such . . . charge" KRS 278.160 provides:

(1) Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates and conditions for service established by it and collected or enforced. . . .

(2) No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than prescribed in such schedules.

Clearly the impact fees charged by Garrard County are "rates" as defined by KRS 278.010(10) and were collected as a condition of service from Imco Development, Delbert Henry, Donald Hensley, and James Laughlin. Inasmuch as the fees were not prescribed in Garrard County's filed tariff, the fees were collected in violation of KRS 278.160 and must be refunded to the developers. KRS 278.160 is unequivocal and cannot be interpreted to give the Commission the discretion to retroactively approve fees collected in violation of its terms.

Garrard County witnesses testified that Donald Hensley voluntarily made improvements to the system equal in value to the assessed impact fee. Although this construction may have been voluntary, Hensley was held responsible for two impact fees by the terms of his contract. The fact that the impact fees were satisfied by construction of other facilities, whether voluntarily or involuntarily, does not change the fact that Hensley received service from the utility for a greater compensation than that prescribed in Garrard County's tariff. If Mr. Hensley had not constructed the six-inch pipe, he would have been assessed the two impact fees per the terms of his contract. Therefore, Mr. Hensley must be reimbursed the difference between the material cost of the six-inch pipe and the material cost of the required four-inch pipe.

The Commission, having considered the evidence of record and being otherwise sufficiently advised, finds that Garrard County charged and collected impact fees which were not prescribed in its

filed tariff and which had not been approved by the Commission, in violation of KRS 278.160. The Commission further finds that Garrard County made extensions of service under arrangements inconsistent with Commission regulations without obtaining the approval of the Commission, in violation of 807 KAR 5:066, Section 12(4).

Garrard County's violation of KRS 278.160 subjects it to the penalties imposed by KRS 278.990. KRS 278.990 provides in part that any private corporation which violates any provisions of KRS Chapter 278 shall, for each offense, be penalized not less than \$25 and no more than \$1,000. While Garrard County is in violation of KRS 278.160, it also appears that the violation was not intentional but resulted from an attempt to protect the financial condition of its system from the impact of a rapidly increasing demand upon portions of that system, and a misunderstanding of what was required in terms of Commission approval of the impact fees. Therefore, the Commission finds that a minimum penalty of \$25 should be imposed for each violation.

IT IS THEREFORE ORDERED that:

1. Within 30 days of the date of entry of this Order, Garrard County shall refund the impact fees collected in cash from Imco Development, Delbert Henry, and James Laughlin. In addition, Garrard County shall refund to James Laughlin the amount spent by him on construction of the pressure-reducing station, and to Donald Hensley, an amount equal to the difference between the

material cost of the six-inch pipe and the required four-inch pipe.

2. Proof that all refunds have been made shall be forwarded by Garrard County to the Commission's offices at 730 Schenkel Lane, Frankfort, Kentucky, within 10 days of the date of refund. Proof of payment may be demonstrated by copies of cancelled checks or by any other means deemed sufficient by the Commission.

3. Pursuant to KRS 278.990, Garrard County shall pay to this Commission a penalty of \$25 for each of the four violations found herein. A certified check in the total amount of \$100, payable to the Kentucky State Treasurer, shall be mailed to the Commission's offices at 730 Schenkel Lane, Frankfort, Kentucky 40601 within 30 days of the date of entry of this Order.

Done at Frankfort, Kentucky, this 6th day of April, 1990.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman


Commissioner

ATTEST:


Executive Director